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# NLRB FINDS THE FILING AND MAINTENANCE OF A REASONABLY BASED LAWSUIT IS NOT UNLAWFUL REGARDLESS OF MOTIVE FOR BRINGING SUIT

In *BE&K Construction Company*, 351 NLRB No. 29, the National Labor Relations Board, in a 3-2 decision, held that the filing and maintenance of a reasonably based lawsuit does not violate the National Labor Relations Act (Act), regardless of the motive for bringing the suit.

BE&K filed a lawsuit against several unions in federal district court in California. Ultimately, the suit alleged that the unions were engaged in activities violating both the Act and antitrust laws. The district court granted the unions' motions for summary judgment and dismissed the employer's suit. The United States Court of Appeals for the Ninth Circuit affirmed the district court's decision.

The unions filed unfair labor practice charges alleging that the lawsuit was unlawful because it was retaliatory, and the General Counsel issued a complaint. In an earlier decision in this proceeding, the Board found, pursuant to *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), that the employer's unsuccessful suit violated Section 8(a)(1) because it was filed to retaliate against the exercise of activities protected by the Act. *BE&K Construction Company*, 329 NLRB 717 (1999). The United States Court of Appeals for the Sixth Circuit enforced the Board's decision. *BE&K Construction Co. v. NLRB,* 246 F.3d 619 (2001).

The Supreme Court, however, rejected the Board's analysis on First Amendment grounds. *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Court first evaluated its relevant precedent concerning the First Amendment's right to petition the government through the courts, most of which had been developed in antitrust cases. The Court found that the threat of an NLRB adjudication amounted to a burden on such petitioning. It also found that the Board's standard for evaluating the lawfulness of completed, unsuccessful lawsuits raised a difficult First Amendment issue. The Court adopted a limiting construction of Section 8(a)(1) to avoid this constitutional issue, and it invalidated the Board's legal standard because it did not comport with that limited construction. The Court remanded the case to the Board for further proceedings consistent with its opinion.

On remand, the Board majority of Chairman Battista and Members Schaumber and Kirsanow noted, first, that in *Bill Johnson's*, the Court had held that, in order to protect the First

Amendment right to petition, an *ongoing*, reasonably based lawsuit could not be enjoined as an unfair labor practice even if its motive was to retaliate against the exercise of rights protected by the Act. In light of the Court's opinion in *BE&K*, the Board then found:

> These principles, in our view, are equally applicable to both *completed* and ongoing lawsuits. ...
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> [The] chilling effect on the right to petition exists whether the Board burdens a lawsuit in its initial phase or after its conclusion. Indeed, the very prospect of liability may deter prospective plaintiffs from filing legitimate claims. Thus, the same weighty First Amendment considerations catalogued by the Court in *Bill Johnson's* with respect to ongoing lawsuits apply with equal force to completed lawsuits. In sum, we see no logical basis for finding that an ongoing, reasonably based lawsuit is protected by the First Amendment right to petition, but that the same lawsuit, once completed, loses that protection solely because the plaintiff failed to ultimately prevail. Nothing in the Constitution restricts the right to petition to winning litigants.
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> ... Accordingly, we find that, just as with an ongoing lawsuit, a completed lawsuit that is reasonably based cannot be found to be an unfair labor practice. In determining whether a lawsuit is reasonably based, we will apply the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is "objectively baseless," if "no reasonable litigant could realistically expect success on the merits." *Professional Real Estate Investors*, 508 U.S. at 60.

In applying its new standard to the facts of the case, the Board found that it was bound by the Court's view that the employer's lawsuit was reasonably based, but it reached the same conclusion based on its own analysis of the suit. Although the suit ultimately was unsuccessful, it was not shown to lack a reasonable basis. Accordingly, the Board dismissed the complaint without evaluating the employer's motive for filing the suit.

In dissent, Members Liebman and Walsh disagreed with the breadth of the majority's decision. In their view, the Supreme Court did not hold that all reasonably based suits are constitutionally immune from liability under the Act, and the majority went too far in protecting First Amendment interests at the expense of rights protected by the Act. The dissent stated:

> What the *BE & K* decision leaves open is convincingly described by the concurring opinion of Justice Breyer in *BE & K*, which was joined by Justices Stevens, Souter, and Ginsburg: The Board may *not* "rest its finding of 'retaliatory motive' almost exclusively upon the simple fact that the employer filed a reasonably based but unsuccessful lawsuit and the employer did not like the union." 536 U.S. at 539. Left open, in contrast, is the possibility of imposing unfair labor practice liability in "other circumstances in which the evidence of 'retaliation' or antiunion motive might be stronger or different." Id.

> One example, as Justice Breyer's concurrence observes, is the situation expressly referred to by the Court's opinion: a case involving "an employer, indifferent to outcome, who intends the reasonably based but unsuccessful lawsuit simply to impose litigation costs on the union." Id. A second example is the lawsuit brought by an employer "as part of a broader course of conduct aimed at harming the unions and interfering with employees' exercise of their rights under" the Act. Id.

In the dissent's view, *Bill Johnson's* requires the Board to balance the need to protect Section 7 rights from incursion by lawsuits against the need to safeguard the constitutional right of access to the courts. Although the *BE&K* Court, distanced itself from *Bill Johnson's*, the dissent asserts that it did not reject this balancing principle, or preclude the Board from imposing a measured burden on the right to petition in order to protect rights under the Act.

The dissent would have remanded the case for further litigation to evaluate whether the employer's suit was retaliatory because it was brought to impose litigation costs on the unions or as part of a broader pattern of conduct unlawful under the Act.

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